Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	**)**	
	)	
Universal Service Contribution Methodology	**)**	**WC Docket No. 06-122**
	)	

COMMENTS OF U.S. TELEPACIFIC CORP. D/B/A TELEPACIFIC COMMUNICATIONS

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Dated: January 11, 2013

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EXECUTIVE SUMMARY

The Wireline Competition Bureau ("Bureau") has proposed changes to the 2013 Forms 499-A and 499-Q, and accompanying instructions, to be used in 2013 to report 2012 revenues and projected 2013 collected revenues on a quarterly basis. Many of the proposed changes impose burdensome requirements on both wholesalers and resellers and will require carriers to adjust their internal systems to comply with all applicable changes, including revisions to their back office billing, collection and accounting systems, as well as ordering processes. Many of the changes impose new requirements that conflict with Commission precedent and the Commission's statutory obligations under the Administrative Procedure Act and Paperwork Reduction Act. The Bureau also has proposed a new definition of "reseller" and new service-by-service certification, both of which violate the Act and the well-established policies of the Commission mandating nondiscrimination and competitive neutrality.

In these Comments, U.S. TelePacific Corp. d/b/a TelePacific Communications provides sound legal argument regarding the process generally and the competitive distortion in the broadband Internet access service market that will be created by these substantive changes. TelePacific respectfully requests that the Commission follow proper procedure and only impose substantive changes after notice and comment.

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COMMENTS

U.S. TelePacific Corp. d/b/a TelePacific Communications ("TelePacific") submits these comments in response to the Public Notice in the above-referenced proceeding[1].

I. INTRODUCTION AND CONTEXT OF COMMENTS

The Wireline Competition Bureau ("Bureau") has proposed changes to (1) the annual Telecommunications Reporting Worksheet, FCC Form 499-A ("2013 Form 499-A") and accompanying instructions ("2013 Form 499-A Instructions") to be used in 2013 to report 2012 revenues, and (2) the quarterly Telecommunications Reporting Worksheet, FCC Form 499-Q ("2013 Form 499-Q") and accompanying instructions ("2013 Form 499-Q Instructions") to be used in 2013 to report projected collected revenues on a quarterly basis. These comments address the process generally and recommend changes to particular sections of the 2013 Form 499-A Instructions. TelePacific's primary concern with the proposed changes relates to the new definition of "reseller" and new service-by-service certification, both of which violate the Communications Act of 1934, as amended ("Act"), and the well-established policies of the Federal Communications Commission mandating nondiscrimination and competitive neutrality.

[1] *Wireline Competition Bureau Seeks Comment on Proposed Changes to FCC Form 499-A, FCC Form 499-Q, and Accompanying Instructions,* Public Notice, WC Docket No. 06-122, DA 12-1872 (rel. Nov. 23, 2012) ("*Public Notice*").

II. PROCESS TO PROPOSE AND APPROVE CHANGES MUST COMPLY WITH COMMISSION PRECEDENT AND ITS STATUTORY OBLIGATIONS UNDER THE ADMINISTRATIVE PROCEDURE ACT AND PAPERWORK REDUCTION ACT

While TelePacific applauds the Bureau for releasing the proposed changes for notice and comment and allowing Form 499 filers to suggest revisions that will assist the Commission and the Universal Service Administrative Company ("USAC") efficiently and accurately to administer the universal service programs, TelePacific believes that many of the changes impose new requirements that conflict with Commission precedent and the Commission's statutory obligations under the Administrative Procedure Act ("APA") and Paperwork Reduction Act ("PRA"). The changes are premature since substantive issues surrounding universal service support are pending before the Commission.[2] The Bureau cannot change substantive rules governing USF through this notice and comment process.[3] Any substantive rule change must be included in a notice of proposed rulemaking issued by the Commission, not through changes to the worksheet instructions. Further, the Bureau has imposed a massive new information collection requirement on resellers, without seeking approval from the Office of Management

[2] The question of whether the Commission should adopt, for the first time, a rule that requires resellers to apportion their wholesale purchases in some manner currently is being considered in the Commission's Further Notice of Proposed Rulemaking regarding comprehensive reform of the USF contribution methodology. *See Universal Service Contribution Methodology, A National Broadband Plan for our Future,* Further Notice of Proposed Rulemaking, 27 FCC Rcd 5357, ¶ 168 (2012) (*"Contribution Methodology Reform FNPRM"*). TelePacific is seeking reconsideration and stay of the portion of the Commission's *2012 Wholesaler-Reseller Clarification Order* "clarifying" that reseller exemption certifications are required on a service-by-service basis. *See* TelePacific's Petition for Partial Reconsideration and Request for Stay, WC Docket No. 06-122, (filed Dec. 5, 2012) (*"TelePacific PFR" and "TelePacific Stay"*).

[3] *See*, in general, Comments of Sprint Nextel Corporation, WC Docket No. 06-122, pp. 15-20 (filed Jan. 9, 2012) (*"Sprint Comments"*); Comments of the Independent Telephone & Telecommunications Alliance in Support of U.S. TelePacific Corp. d/b/a TelePacific Communication's Petition for Partial Reconsideration and Request for Stay, WC Docket No. 06-122, (filed Jan. 9, 2012)(*"ITTA Comments"*), which TelePacific incorporates herein by reference.

and Budget ("OMB"), rendering the 2013 Form 499-A Instructions, and the underlying *2012 Wholesaler-Reseller Clarification Order*, unenforceable under the PRA.[4]

TelePacific also suggests that changes only should be proposed prior to the start of a revenue year so carriers have the opportunity to build applicable changes into their quarterly estimates, customer invoices and internal systems. Many of the proposed changes impose burdensome requirements on both wholesalers and resellers and will require carriers to adjust their internal systems to comply with all applicable changes, including revisions to their back office billing, collection and accounting systems, as well as ordering processes. The PRA does not permit the Commission to impose this burden without notice and comment, a Commission estimation and justification of the burden, and subsequent OMB approval.[5]

III. DEFINITION OF "RESELLER" CONFLICTS WITH PRIOR COMMISSION ORDERS AND DISCRIMINATES AMONG PROVIDERS OF BROADBAND INTERNET ACCESS SERVICES

The Bureau proposes several changes to the 499-A Instructions regarding attribution of revenues from contributing resellers and from end users (pp. 22-28) and adds an objectionable definition of "reseller"[6]. The proposed definition conflicts with prior Commission orders and creates discrimination among providers of broadband Internet access services contrary to existing Commission rules. In the TelePacific PFR, TelePacific has requested that the Commission partially reconsider and stay, *inter alia*, the portion of the *2012 Wholesaler-Reseller*

[4] Sprint Comments, p. 4
[5] 44 USC §3506(c).
[6] *Public Notice*, n.54 ("For this purpose, a reseller is a telecommunications service provider that 1) incorporates purchased telecommunications services into its own offerings and 2) can reasonably be expected to contribute to support universal service based on revenues from those offerings").

Clarification Order[7] regarding this very definition. Under the proposed definition, leased special access transmission facilities used by carriers as inputs to broadband Internet access service are subject to universal service assessment and such carriers must be treated as end users rather than resellers for reporting purposes. It is discriminatory to assess USF contributions on common carrier transmission facilities leased by carriers and incorporated into an integrated broadband Internet access service but not on the identical transmission facilities self-provisioned by carriers providing broadband Internet access service or leased by carriers on a private carriage basis to provide broadband Internet access service. Neither wholesalers of broadband transmission facilities used to provision Internet access service nor the resellers that provide the Internet access service should be assessed USF contribution on the transmission facility revenues.

In a series of orders, the Commission deliberately and expressly created a level playing field for all broadband Internet access services, regardless of the transmission technology or network used to deliver such services.[8] In the seminal *Wireline Broadband Order*, the

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[7] *Universal Contribution Methodology, Application for Review of Decision of the Wireline Competition Bureau filed by Global Crossing Bandwidth, Inc., et al.,* WC Docket No. 06-122, Order, FCC 12-134 (rel. Nov. 5, 2012) (*"2012 Wholesaler-Reseller Clarification Order"*).

[8] *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901, ¶56 (2007) (stating the Commission's goal of "encouraging the development of information services by ensuring that they remain free from common carrier regulation, and services the Act's overarching goal of fostering competition by providing a level playing field in the market and removing unnecessary regulatory impediments."); *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, WC Docket No. 06-10, Memorandum Opinion and Order, 21 FCC Rcd 13281, ¶2 (2006) (classifying broadband over power lines as an information service and holding that such classification "furthers the Commission's goal of developing a consistent regulatory framework across broadband platforms by regulating like services in a similar manner"); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, ¶1 (2005) ("*Wireline Broadband Order*") (finding that the Commission's determination that broadband access to the Internet over wireline is an information service "furthers the goal of developing a consistent regulatory framework across platforms by regulating like services in a similar functional manner,

Commission was clear that a broadband Internet access service would be classified as an information service regardless of the underlying transmission technology.[9] The Commission subsequently clarified that this bedrock nondiscrimination principle also applies in the case of indirect contribution by downstream providers that purchase broadband transmission from facilities-based carriers to incorporate in their broadband Internet access services.

The Bureau's proposed definition of "reseller," however, substantially undercuts this nondiscrimination principle and actually creates discrimination among providers of broadband Internet access services. This discrimination (1) violates Section 254 of the Act, (2) contradicts the Commission's policy mandating a level playing field for all broadband Internet access services, (3) contradicts the Commission's goal of fostering competition and ensuring affordable access to broadband Internet access services to every American, and (4) violates the Commission's well-established policy of competitive neutrality by creating a cascading effect that imposes USF on providers of broadband Internet access services utilizing certain leased special access services while not imposing USF on facilities-based providers of the identical service. As stated above, such a substantive rule change must be included in a notice of proposed rulemaking issued by the Commission and cannot be changed by the Bureau through revisions to the Form 499-A Instructions.

TelePacific restates each of the arguments presented in the TelePacific PFR and TelePacific Stay, which are attached hereto and incorporated herein as **Attachment A**.

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after a transitional period"); *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Invent Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, ¶6 (200) (holding that the Commission's Order "seek[s] to create a rational framework for the regulation of competing services that are provided via different technologies and network architectures" and "strive[s] to develop an analytical approach that is to the extent possible consistent across multiple platforms").

[9] *Wireline Broadband Order*, ¶16.

IV. IMPLEMENTATION OF A NEW RESELLER CERTIFICATION PROCESS IS PREMATURE AND THE PROPOSED PROCESS IS CONFUSING AND UNDULY BURDENSOME

A. Implementation is Premature.

The alternative language[10] to implement a service-by-service certification is premature and should not be included in the 2013 Form 499-A Instructions. The Bureau even acknowledges that a proceeding is pending to consider adopting a rule to specify language for reseller certificates.[11] As stated above, there should be a separate schedule for comments and replies on options to implement a service-by-service certification.

B. Model Language is Confusing and Unduly Burdensome

To the extent the 2013 Form 499-A Instructions are revised without a separate review to include the proposed model language, TelePacific points out that the use of "OR" in the alternative language creates confusion. It appears, though it is not clear, that a reseller has the ability to select one of three options. TelePacific urges the Commission to clarify the intended use of each option.

The proposed alternative "safe harbor" option[12] is unduly burdensome. Consistent with the argument raised in the Sprint Nextel Comments,[13] in practice, the new requirement to analyze and certify reseller status on a service-by-service basis appears to require TelePacific to undertake a circuit-by-circuit analysis in order to determine which leased circuits are used solely to provide broadband Internet access services to TelePacific's customers. TelePacific acquires access to transmission facilities from a number of different vendors and TelePacific integrates those circuits into a variety of different services. At any time, TelePacific or a customer may

[10] *Public Notice*, p. 24.
[11] *Contribution Reform Methodology FNPRM*, ¶169.
[12] *Public Notice*, p. 24.
[13] Sprint Comments, n.2.

shift the way a given circuit is used. If TelePacific's reseller certifications are to indicate whether a vendor's circuits are used for a service that generates USF-assessable revenue, TelePacific continuously must track how each vendor's individual circuits are being used at any given time and must continuously issue revised certifications to its vendors. For example, if TelePacific provides only broadband Internet access service to a customer, TelePacific cannot claim exemption for the special access circuit used to provide that broadband Internet access service. However, if TelePacific's customer later adds a voice service to that circuit (i.e., using a dynamic T1), TelePacific would have to change its reseller certification to then claim exemption on this same special access circuit. This could result in multiple exemption certificates being issued throughout the same calendar year, wreaking havoc with all USF administrative processes (USF projections, 499Q filings, customer invoicing, etc.).

As stated above in Section II, the Commission cannot impose burdensome requirements on carriers without notice and comment, a Commission estimation and justification of the burden, and subsequent OMB approval.

C. Flexibility to Verify Reseller Status.

To the extent a service-by-service certification is required and to prevent the aforementioned unduly burdensome requirements, TelePacific suggests that carriers have flexibility in verifying reseller status to achieve the same result through different means. Specifically, to avoid costly and unduly burdensome processes in implementing the service-by-service exemption through a circuit ordering process, resellers should be permitted to continue to certify exemption on an entity basis if they implement other reliable methods to report actual cost or good faith estimates of revenue relating to the transmission component of wireline

broadband Internet access service to ensure contribution to federal universal service support mechanisms. For example:

> Reseller claims entity exemption. As of a certain date (e.g., quarterly), reseller had approximately 8,000 circuits that provided broadband Internet access service only. At an average cost per circuit of $120, reseller would report to USAC $960,000 in revenue subject to USF contribution.

The above example keeps the USF "whole" and streamlines the certification process, eliminating the unduly burdensome requirements created by the proposed model language.

V. RECOMMENDED CHANGES TO SPECIFIC SECTIONS OF THE 2013 FORM 499-A INSTRUCTIONS

A. Obligation to File Revisions, p. 9 / Filer Revenue Information, p. 14

On pages 9 and 14 of the 2013 Form 499-A Instructions, the Bureau adds language stating that if the operations of an entity ceased during the previous calendar year and are now part of a successor, it is the successor company's responsibility to ensure that the revenues for both companies for the previous calendar year are accounted for in their entirety. This is an issue customarily left for agreement among the contract parties – not an issue for the Commission or the Bureau to decide. The Commission already has a process in place for companies to report mergers to USAC and to identify which entity will report revenues for which period.[14] The Commission should not change the 2013 Form 499-A Instructions in a way that pre-empts companies' rights to make this decision contractually.

B. Sale of Special Access on a Common Carrier Basis to Providers of Retail Broadband Internet Access Service, p. 18

To the extent the Commission fails to accept the substantive arguments presented in Sections I-IV above, the Commission should clarify that revenues derived from the sale of

[14] *See* http://www.usac.org/_res/documents/cont/pdf/mergers/deactivation-sale.pdf.

special access on a common carrier basis to providers of retail broadband Internet access service but resold as a telecommunications service should not be reported on Line 406. Many providers of retail broadband Internet access service also provide voice services and contribute directly to the USF on revenues received by end users of those voice services.

The Bureau proposes to change page 18 of the 2013 Form 499-A Instructions to state: "Filers should report on Line 406 revenues derived from the sale of special access on a common carrier basis to providers of all retail broadband Internet access service." This sentence conflicts with the proposed service-by-service certification process and likely will result in double USF contribution on the same special access circuit.

This addition also is inconsistent with the *2012 Wholesaler-Reseller Clarification Order,* which allows contributors and sellers to rely on entity certifications through December 31, 2013, in order to give wholesalers and customers time to make changes to internal policies and procedures.[15] The 2013 Form 499-A Instructions should be revised to include this transition period.

VI. CONCLUSION

As described herein, TelePacific provides specific recommended revisions to particular sections of the 2013 Form 499-A Instructions and provides sound legal argument regarding the process generally and the competitive distortion in the broadband Internet access service market that will be created by these substantive changes. TelePacific respectfully requests that the Commission follow proper procedure and only impose substantive changes after notice and comment.

[15] *2012 Wholesaler-Reseller Clarification Order*, ¶41.

Respectfully submitted,

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Dated: January 11, 2013

U.S. TelePacific Corp. d/b/a TelePacific Communications
Comments to 2013 FCC Form 499-A Instructions

ATTACHMENT A

TelePacific Petition for Partial Reconsideration
and Request for Stay Pending Reconsideration
of *2012 Wholesaler-Reseller Clarification Order*
Filed: Dec. 5, 2012

Before the
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Washington, D.C. 20554

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	)	
XO Communications Services, Inc. Request for Review of Decision of the Universal Service Administrator	)	
	)	
Universal Service Administrative Company Request for Guidance	)	

PETITION FOR PARTIAL RECONSIDERATION

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Dated: December 5, 2012

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EXECUTIVE SUMMARY

U.S. TelePacific Corp. d/b/a TelePacific Communications ("TelePacific") requests that the FCC partially reconsider its *2012 Wholesaler-Reseller Clarification Order*[1] and address the issues raised by TelePacific in this proceeding to ensure that the universal service fund ("USF") contribution rules are applied to TelePacific and similarly situated providers of broadband Internet access services in a competitively neutral and nondiscriminatory manner and not in violation of Section 254 of the Communications Act ("Act") and the well-established Commission policy of nondiscrimination and competitive neutrality.

The Commission's errors can be traced to its failure to address material issues presented by TelePacific. It erroneously assumed TelePacific was seeking reconsideration of previously adopted orders and simply dismissed TelePacific's concerns as untimely.[2] By failing to address these issues, the Commission adopted a new reseller certification requirement that creates discrimination among providers of broadband Internet access services and adversely affects TelePacific and similarly situated providers of broadband Internet access services. This discrimination materially (1) violates Section 254 of the Act, (2) contradicts the Commission's policy mandating a level playing field for all broadband Internet access services, (3) contradicts the Commission's goal of fostering competition and ensuring affordable access to broadband Internet access services to every American, and (4) violates the Commission's well-established policy of competitive neutrality by creating a cascading effect that imposes USF on providers of

[1] *AT&T, Inc. CenturyLink, SureWest Communications and Verizon Petition for Clarification or in the Alternative for Partial Reconsideration*, Order, WC Docket No. 06-122, FCC 12-134 (Nov. 5, 2012) ("*2012 Wholesaler-Reseller Clarification Order*").

[2] *2012 Wholesaler-Reseller Clarification Order* at n.109.

broadband Internet access services utilizing certain leased special access facilities but not imposing USF on facilities-based providers of the identical service.

TelePacific did not seek then, and is not seeking now, reconsideration of prior FCC Orders. Rather, TelePacific seeks partial reconsideration of the *2012 Wholesaler-Reseller Clarification Order* because it purports to apply the decisions adopted in the *Wireline Broadband Order* and the *Contribution Methodology Order* to TelePacific in a way that violates the Act and Commission rules and policies. Specifically, the *2012 Wholesaler-Reseller Clarification Order* "clarified" that "reseller" certification is required on a service-by-service basis and requires carriers to treat TelePacific as an end-user with respect to any leased special access service that TelePacific incorporates only into a broadband Internet access service. TelePacific properly raises this substantive challenge now because the Commission is attempting to apply unlawfully its prior orders against TelePacific through the *2012 Wholesaler-Reseller Clarification Order*. The Form 499 Instructions that currently apply the carrier's carrier rule on an entity-by-entity basis, consistent with past Commission orders and rules, effectively exempt telecommunications services used as inputs in broadband Internet access service when provided by a USF contributor such as TelePacific. The *2012 Wholesaler-Reseller Clarification Order* ignores the conflict its new service-by-service interpretation creates with the *First Report and Order*. The Commission cannot change its definition of reseller certification without acknowledging and explaining the reason for the change.

Reconsideration is appropriate for the Commission to correct the material errors and omissions in the *2012 Wholesaler-Reseller Clarification Order*. Such reconsideration will result in substantial alteration of the decision, which is necessary for the *2012 Wholesaler-Reseller*

Clarification Order to be placed in compliance with the Act and the Commission's long-standing principles of nondiscrimination and competitive neutrality.

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	)	
XO Communications Services, Inc. Request for Review of Decision of the Universal Service Administrator	)	
	)	
Universal Service Administrative Company Request for Guidance	)	

PETITION FOR PARTIAL RECONSIDERATION

I. INTRODUCTION AND BACKGROUND

U.S. TelePacific Corp. d/b/a TelePacific Communications ("TelePacific") requests that the Federal Communications Commission ("Commission") partially reconsider its *2012 Wholesaler-Reseller Clarification Order* and address the issues raised by TelePacific in this proceeding to ensure that the universal service fund ("USF") contribution rules are applied to TelePacific and similarly situated providers of broadband Internet access services in a competitively neutral and nondiscriminatory manner and not in violation of Section 254 of the Communications Act and the well-established Commission policy of nondiscrimination and competitive neutrality. TelePacific simultaneously is filing a Request for Stay Pending Reconsideration.

The Commission erroneously assumed TelePacific was seeking reconsideration of previously adopted FCC Orders and simply dismissed TelePacific's concerns as untimely.[3] By imposing USF on the leased special access circuits used only in TelePacific's broadband Internet access service, but not on the identical circuits used in the broadband Internet access service offered by an ILEC over its own facilities, the Commission acted arbitrarily and capriciously without even acknowledging, let alone resolving, all of the issues TelePacific presented.

TelePacific did not seek then, and is not seeking now, reconsideration of prior Commission Orders. Rather, TelePacific seeks partial reconsideration of the *2012 Wholesaler-Reseller Clarification Order* because it attempts to apply the decisions adopted in the *Wireline Broadband Order* and the *Contribution Methodology Order* to TelePacific in a way that violates the Act and Commission rules and policies. TelePacific is requesting that the Commission reconsider its inappropriate application upon TelePacific of these prior Commission Orders.

Specifically, the *2012 Wholesaler-Reseller Clarification Order* "clarified" that "reseller" certification is required on a service-by-service basis and requires carriers to treat TelePacific as an end-user when TelePacific incorporates leased special access services only into its broadband Internet access service. The Form 499 Instructions that apply the carrier's carrier rule on an entity-by-entity basis create an exemption for telecommunications services used as inputs in broadband Internet access service when provided by a USF contributor such as TelePacific. The *2012 Wholesaler-Reseller Clarification Order* ignores the conflict its new service-by-service interpretation creates with the *First Report and Order*.[4] The Commission cannot change its reseller certification without acknowledging and explaining the reason for the change.

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[3] *2012 Wholesaler-Reseller Clarification Order* at n.109.

[4] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776 (1997) ("*First Report and Order*").

In the *2012 Wholesaler-Reseller Clarification Order*, the Commission purported to resolve various requests for review and petitions for clarification, including the Petition for Clarification or in the Alternative for Partial Reconsideration filed by AT&T Inc., CenturyLink, SureWest Communications, and Verizon[5] of certain language in the *TelePacific Order*[6] relating to the transmission component of broadband Internet access services and USF reporting obligations. However, the Commission failed to address several material issues raised by TelePacific, including TelePacific's argument that it is discriminatory for the FCC to assess USF on the incumbent local exchange carrier ("ILEC") when the ILEC provides special access circuits to TelePacific as an input to TelePacific's wireline broadband Internet access service – resulting in TelePacific indirectly contributing to the USF in the form of ILEC surcharges – while there is no USF contribution at all when the ILEC uses its own facilities as an input to the ILEC's wireline broadband Internet access service. This discrimination (1) violates Section 254 of the Act, (2) contradicts the Commission's policy mandating a level playing field for all broadband Internet access services, (3) contradicts the Commission's goal of fostering competition and ensuring affordable access to broadband Internet access services to every American, and (4) violates the Commission's well-established policy of competitive neutrality by creating a cascading effect that imposes USF on providers of broadband Internet access services utilizing certain leased special access services while not imposing USF on facilities-

[5] *AT&T Inc., CenturyLink, SureWest Communications and Verizon Petition for Clarification or in the Alternative for Partial Reconsideration*, WC Docket No. 06-122 (filed June 1, 2010) ("Petition for Clarification").

[6] *Request for Review of a Decision of the Universal Service Administrator and Emergency Petition for Stay by U.S. TelePacific Corp. d/b/a TelePacific Communications,* Order, WC Docket No. 06-122, 25 FCC Rcd 4652 (Wireline Comp. Bur. 2010) ("*TelePacific Order*").

based providers of the identical service.[7] The Commission's action unilaterally to change the "reseller certification," without first deciding the threshold question of whether the application of USF contribution rules in the manner stated in the *2012 Wholesaler-Reseller Clarification Order* violates Section 254 of the Act and well-established Commission policies of competitive neutrality and leveling the playing field for all forms of broadband Internet access, is both arbitrary and contrary to law.

Based on the language of the *2012 Wholesaler-Reseller Clarification Order*, TelePacific believes that partial reconsideration of the *2012 Wholesaler-Reseller Clarification Order* is necessary because of the Commission's arbitrary and capricious failure to address the material issues TelePacific presented in the underlying proceeding and the Commission's inappropriate application of the *Wireline Broadband Order* and the *Contribution Methodology Order*. By failing to address these issues, the Commission instituted rules, through the *2012 Wholesaler-Reseller Clarification Order*, which materially contradict the Act and adversely affect TelePacific and similarly situated providers of broadband Internet access service. Therefore, this Petition for Reconsideration must be granted to give the Commission an opportunity to correct this material error in the *2012 Wholesaler-Reseller Clarification Order*.[8]

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[7] Opposition of U.S. TelePacific Corp. d/b/a TelePacific Communications to Petition for Clarification or in the Alternative for Partial Reconsideration, WC Docket No. 06-122 (filed July 6, 2010) ("TelePacific Opposition"); Letter from Andrew Lipman *et al.*, Counsel for U.S. TelePacific Corp. d/b/a TelePacific Communications to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-122 at 2 (filed Feb. 1, 2010) ("TelePacific Feb. 1, 2010 *Ex Parte*").

[8] The Commission has consistently held that "the only valid grounds for rehearing are manifest error or omission so material that the corrections would result in substantial alteration of the original decision. Correspondingly, rehearing generally is not available for the purpose of rearguing matters on which there has been deliberation and decision …." *In re: Liability of Sonic Cable TV Grover City, CA Arroyo Grande, CA Pismo Beach, CA*, 1985 FCC LEXIS 2585 (FCC 1985) *citing Empire State Cable TV Co., Inc. (Binghamton, NY)*, 10 FCC 2d 341, 342 (1967).

II. TELEPACIFIC'S PETITION FOR RECONSIDERATION CHALLENGES A SPECIFIC APPLICATION OF PREVIOUSLY ADOPTED FCC ORDERS TO TELEPACIFIC AND IS NOT AN UNTIMELY PETITION FOR RECONSIDERATION OF THE *WIRELINE BROADBAND ORDER* OR THE *CONTRIBUTION METHODOLOGY ORDER*.

As TelePacific has argued,[9] when an agency attempts to enforce an order against a party, the agency cannot escape a substantive challenge merely because the time for review of the initial rulemaking order has passed.[10] The Telecommunications Access Policy Division recognized a party's right to challenge application of a rule in the context of a USAC appeal, stating that "even where the period for challenging a general rule has passed, parties may still challenge a specific application of the rule on the grounds that the rule is substantively invalid."[11] As the U.S. Court of Appeals for the District of Columbia Circuit explained, "administrative rules and regulations are capable of continuing application; limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity."[12] Applying these previously adopted FCC Orders to TelePacific and similarly situated carriers as the Commission suggested in the *2012 Wholesaler-Reseller Clarification Order* would violate the principle of competitive neutrality and Section 254 of the

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See also Reconsideration of Commission's Action, 77 FCC 2d 54, 55 (1980); *WWIZ, Inc. (Lorain, OH)*, 37 FCC 685, 686 (1964).

[9] Notice of *Ex Parte* Communications Letter from Tamar E. Finn, Counsel for U.S. TelePacific Corp. to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-122 (filed Mar. 31, 2011).

[10] *See, e.g., Functional Music, Inc. v. Federal Communications Commission*, 274 F.2d 543, 546 (D.C. Cir. 1958) (providing that review of a final agency order can be obtained after the initial limitations period in cases where the agency takes further action to apply the rule.)

[11] *Petition for Reconsideration of the Request for Review of the Decision of the Universal Service Administrator by Prince George's County Schools, Upper Marlboro, Maryland; Federal-State Joint Board on Universal Service; Changes to the Board of Directors of the National Exchange Carrier Association Inc.*, Order on Reconsideration, 17 FCC Rcd 8649, ¶5 (Telecommunications Access Policy Division, 2002) (citing *Functional Music*).

[12] *Functional Music*, 274 F.2d at 546.

Act, would create an unlevel playing field, and would unfairly disadvantage TelePacific and other similarly situated carriers vis-à-vis their competitors that provide broadband Internet access over their own facilities. Such a requirement is an institutionalization of commercial inequality and directly contradicts the Commission's goal of fostering competition and ensuring affordable broadband Internet access to every American. TelePacific is permitted to raise this substantive challenge now because the Commission is attempting to unlawfully apply its prior orders against TelePacific through the *2012 Wholesaler-Reseller Clarification Order*.

III. THE COMMISSION MUST CORRECT THE MATERIALLY ERRONEOUS DIRECTIVE IMPOSED UPON TELEPACIFIC THROUGH THE *2012 WHOLESALER-RESELLER CLARIFICATION ORDER* AND THE COMMISSION MUST ABIDE BY ITS COMMITMENT TO CREATE A LEVEL PLAYING FIELD FOR ALL BROADBAND INTERNET ACCESS SERVICES

In a series of orders, the Commission deliberately and expressly created a level playing field for all broadband Internet access services, regardless of the transmission technology or network used to deliver such services to end users.[13] In the seminal *Wireline Broadband Order*,

[13] *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901, ¶56 (2007) (stating the Commission's goal of "encouraging the development of information services by ensuring that they remain free from common carrier regulation, and services the Act's overarching goal of fostering competition by providing a level playing field in the market and removing unnecessary regulatory impediments."); *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, WC Docket No. 06-10, Memorandum Opinion and Order, 21 FCC Rcd 13281, ¶2 (2006) (classifying broadband over power lines as an information service and holding that such classification "furthers the Commission's goal of developing a consistent regulatory framework across broadband platforms by regulating like services in a similar manner"); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, ¶1 (2005) ("*Wireline Broadband Order*") (finding that the Commission's determination that broadband access to the Internet over wireline is an information service "furthers the goal of developing a consistent regulatory framework across platforms by regulating like services in a similar functional manner, after a transitional period"); *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Invent Over Cable Facilities,* Declaratory Ruling and

the Commission was clear that a broadband Internet access service would be classified as an information service regardless of the underlying transmission technology.[14] As explained on the record,[15] and again below in Section III.A., the Commission subsequently clarified that this bedrock nondiscrimination principle also applies in the case of indirect contribution by downstream providers that purchase broadband transmission from facilities-based carriers to incorporate in their broadband Internet access services. The *2012 Wholesaler-Reseller Clarification Order*, however, substantially alters this nondiscrimination principle and actually creates discrimination among providers of broadband Internet access services. This discrimination (1) violates Section 254 of the Act, (2) contradicts the Commission's policy mandating a level playing field for all broadband Internet access services, (3) contradicts the Commission's goal of fostering competition and ensuring affordable access to broadband Internet access services to every American, and (4) violates the Commission's well-established policy of competitive neutrality by creating a cascading effect that imposes USF on providers of broadband Internet access services utilizing certain leased special access services while not imposing USF on facilities-based providers of the identical service. Reconsideration is an appropriate mechanism for the Commission to correct the material errors and omissions in the *2012 Wholesaler-Reseller Clarification Order*. Such reconsideration will result in substantial alteration of the Commission's original decision, which is a necessary correction for the *2012*

Notice of Proposed Rulemaking, 17 FCC Rcd 4798, ¶6 (200) (holding that the Commission's Order "seek[s] to create a rational framework for the regulation of competing services that are provided via different technologies and network architectures" and "strive[s] to develop an analytical approach that is to the extent possible consistent across multiple platforms").

[14] *Wireline Broadband Order*, ¶16.

[15] TelePacific Feb. 1, 2010 *Ex Parte*.

Wholesaler-Reseller Clarification Order to be consistent with the Act and the Commission's long-standing principles of nondiscrimination and competitive neutrality.

A. Indirect USF Contributions and the *Contribution Methodology Order*

In 2006, months after the time to appeal the *Wireline Broadband Order* had passed, an independent Internet Service Provider ("ISP"), EarthLink, Inc. ("EarthLink"), wrote to then-Bureau Chief Thomas Navin seeking clarification of that Order to ensure that it was implemented to treat ILECs and other ISPs in a competitively neutral manner.[16] EarthLink explained that if the ILEC selling DSL transmission service treated EarthLink as an end user, EarthLink would be required to make an indirect contribution to USF. In contrast, the ILEC would not be required to make any USF contribution when providing the wireline broadband Internet access service to its direct end users. In short, EarthLink's indirect USF contribution (through the ILEC) put EarthLink at a distinct competitive disadvantage in the market for wireline broadband Internet access service.

The Commission, in order to ensure its commitment to a level playing field, correctly fixed this inequity in footnote 206 of the *Contribution Methodology Order*.[17] Citing the EarthLink *ex parte*, the Commission held that providers of detariffed broadband transmission services would not be required to contribute to USF on such services after the end of the

[16] Notice of *Ex Parte* Communication Letter from Mark J. O'Connor, Counsel to EarthLink, Inc., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 02-33 (filed June 8, 2006) ("EarthLink *Ex Parte*").

[17] *Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, n.206 (2006) ("*Contribution Methodology Order*") ("To the extent that a provider has discontinued providing that service as a common carrier service, it is not required to contribute to the universal service fund based on the revenues derived from providing that transmission service after the expiration of the 270 day contribution freeze period.").

transition period (August 2006). Absent this clarification, as EarthLink pointed out,[18] the FCC could have inadvertently tilted the broadband information services arena by effectively affording a cost advantage to incumbent facilities-based providers of retail DSL-based Internet access information services in the amount of the USF contribution. In the instant proceeding, the FCC again could inadvertently tilt the wireline broadband Internet access service arena by effectively affording a cost advantage to incumbent facilities-based providers of retail broadband Internet access in the amount of the USF contribution on special access services. Under the *2012 Wholesaler-Reseller Clarification Order*, TelePacific is required to contribute indirectly to the USF on its broadband Internet access service, while the ILECs are not required to make any USF contributions on the identical service. Ownership of the facilities used in the provision of broadband Internet access service should not affect the FCC's exemption of such service from USF contributions. "What matters is the finished product rather than the facilities used to provide it."[19]

B. Section 254 and the USF Principle of Competitive Neutrality

Section 254(d) requires contributions to USF be assessed on an "equitable and nondiscriminatory basis, to the specific, predictable and sufficient mechanisms established by the [FCC]."[20] In the *First Report and Order*, the FCC adopted a principle of competitive neutrality:

> competitive neutrality means that universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another.[21]

[18] EarthLink *Ex Parte*, p.1

[19] *Wireline Broadband Order*, ¶16.

[20] 47 U.S.C. §254(d).

[21] *First Report and Order*, ¶47.

Further, the Universal Service Administrative Company ("USAC") is required to administer the universal service support mechanisms "in an efficient, effective and competitively neutral manner."[22]

Assessing USF contributions on the provider of the upstream transmission service (here, the ILECs providing TelePacific special access circuits) utilized as an input to TelePacific's broadband Internet access service violates the principle of competitive neutrality. It also contradicts and undermines the USF exemption the Commission granted for the finished service, especially because the Commission went out of its way to emphasize that "there is no reason to classify wireline broadband Internet access services differently depending on who owns the transmission facilities."[23]

In the *2012 Wholesaler-Reseller Clarification Order*, the Commission acted reflexively to impose USF on the transmission service merely because it is offered on a common carrier basis (*i.e.*, as a telecommunications service). Although footnote 26 of the *Contribution Methodology Order* does not address directly whether transmission service offered on a common carrier basis enjoy the same exemption when sold for use as an input in a broadband Internet access service, for purposes of Section 254(g)'s equitable and nondiscriminatory requirement and the competitive neutrality principle, common versus private carriage is a distinction without a difference. The Commission determined in 1997 that the "principle of competitive neutrality" mandates that all "entities that provide interstate telecommunications," including those that operate on a non-common-carrier basis, must contribute to universal service.[24] This rule was codified at 47 C.F.R. §54.706(a), and remains in effect. The Commission therefore cannot apply

[22] TelePacific Opposition at 5 *citing* 47 C.F.R. §54.701(a).

[23] *Wireline Broadband Order*, ¶16.

[24] *First Report and Order*, ¶¶794-796.

the *Contribution Methodology Order* to exempt private carriers without also exempting common carriers providing the same services.[25] Imposing USF indirectly on the special access service input is like pulling the first string that unravels the competitive neutrality quilt the Commission fashioned in the *Wireline Broadband Order.*

C. Upstream Assessment of USF Undermines the Exemption of Broadband Internet Access Service from USF

Exempting telecommunications services from USF contribution, in these particular circumstances, is consistent with the text of the statute, congressional intent and the authority delegated to the FCC. By way of example, in the *First Report and Order*, the Commission recognized that carriers providing telecommunications services on a wholesale basis would not contribute to USF on such services, even though such services fall under the "mandatory" contribution category of telecommunications services. The Commission justified this "exemption" of certain telecommunications services to avoid the double counting problem.[26] The Commission explained the problem as follows:

> [I]f facilities-based carrier X sells $200.00 worth of telecommunications services directly to a customer, its contribution will be $20.00. If reseller B buys $180.00 worth of wholesale services from carrier A and B sells the same retail services in competition with X after adding $20.00 of value, B would owe a contribution of $20.00 on these $200.00 worth of services, but B would also be required to recover the portion of the $18.00 contribution that A must make and would likely pass on to B. Therefore, while X would face $200.00 in service costs and $20.00 in support costs, B would face $200.00 in service costs and almost certainly substantially more than $20.00 in support costs.[27]

[25] "Agencies are under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departures." *National Conservative Political Action Committee v. FEC,* 626 F.2d 953, 959 (D.C. Cir. 1979); *accord, Colorado Springs v. Solis,* 589 F.3d 1121, 1132 (10th Cir. 2009).

[26] *First Report and Order*, ¶845.

[27] *Id*.

The facts here are strikingly similar. If facilities-based carrier X sells $200 worth of broadband Internet access to a direct customer, its USF contribution will be $0. If reseller B (here, TelePacific) buys $180 worth of wholesale services from facilities-based carrier A and B sells the same retail services in competition with X after adding $20 of value, B would owe a contribution of $0, but B would also be required to recover the portion of the $18 USF contribution that A must make and would likely pass on to B. Therefore, while X would face $200 in service costs and $0 in USF contribution, B would face $200 in service costs and $18 in USF contribution costs.

In the *Contribution Methodology Order*, the Commission eliminated an upstream contribution obligation in a way that respects its exemption for the finished broadband Internet access service. The same rationale justifies an "exemption" for telecommunications services used as an input in broadband Internet access. It is inconsistent with well-established principles that once an exemption is granted for a certain product, the fee or tax will not be imposed on upstream providers. The upstream exemption is necessary to avoid the manifest unfairness of the cascading effects of fees and taxes.

D. Refusing to Apply USF to Upstream Carriers Promotes Good Policy

As TelePacific argued,[28] although tax policy considerations are not directly relevant to USF policy considerations, they are helpful as analogies. Like USF, state sales taxes as applied nationwide are cascading taxes that generally are only imposed on retail sales made to consumers. Therefore, sales at stages earlier than the retail level (non-retail sales or wholesales), generally are not subject to the tax. The exemption for non-retail sales avoids the cascading effect of taxes imposed at each stage of the production process.

[28] TelePacific Feb. 1, 2010 *Ex Parte*, p.7-8.

When a cascading tax is applied, it causes an amount of tax paid at a previous stage to be again subject to tax at a later stage in the production and, as a result, the same amount may be taxed multiple times in the processes of production and distribution, creating a "tax-on-tax" effect.[29] Cascading taxes have the obvious flaw of taxing specialized, nonintegrated production processes far more heavily than others. To combat this effect, most states impose the sales tax on the gross amount of the retail sale ensuring that all of the component costs of production (*i.e.*, raw materials, labor, etc.) as well as returns on capital (*i.e.*, interest, rent and profits) are included in the tax base as reflected in the final price of the product sold to the consumer, thus avoiding discrimination against nonvertically integrated companies in favor of vertically integrated companies.[30]

An indirect USF contribution by TelePacific based on the cost of the broadband transmission service it leases from an ILEC to provide a retail information service is a cost that the competing provider owning the broadband transmission facilities (*e.g.*, the ILEC) does not bear when providing the identical retail information service. For this reason, it is axiomatic sales tax policy that once an entity is provided an exemption, the taxing authority should not undermine that exemption by imposing tax on the upstream provider. In fact, where one party in the chain ultimately is required to bear the burden of a tax, the tax law provides the necessary exemption, deduction and credit mechanisms to ensure the tax falls as intended.

Tax policy lends support for the principle that different producers of like products and services should be treated similarly unless economic considerations otherwise distinguish the

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[29] Dr. Robert F. Van Brederode, *A Normative Evaluation of Consumption Tax Design: The Treatment of the Sales of Goods under VAT in the European Union and Sales Tax in the United States*, 62 Tax Law 1055, 1064 (2009).

[30] Daniel S. Goldberg, *E-Tax: Fundamental Tax Reform and the Transition to a Currency Free Economy*, 20 VA Tax L. Rev. 1, 34 (2000).

producers. The Supreme Court in *Complete Auto Transit v. Brady*[31] found that a Commerce Clause violation occurs where a tax unfairly burdens, and as a result discriminates against, interstate commerce, unless the state provides a sufficient justification for the discrimination. The policy reasons against discriminating against otherwise similar providers because of geographic or technological distinctions between services providers is equally applicable to USF policy. Giving facilities-based providers a "tax" (*i.e.*, USF) advantage over non-facilities-based providers of the same service amounts to a governmental preference for one carrier over another, and generally is avoided under tax policy as distortive to the proper functioning of free markets.

E. FCC Form 499-A Instructions and Entity-by-Entity Exemption

In tandem with addressing TelePacific's substantive arguments that the *2012 Wholesaler-Reseller Clarification Order* as applied to TelePacific violates the Act, the Commission should revisit its finding about "reseller" certification in footnote 111 and paragraphs 40-41. As TelePacific and others argued,[32] the current Form 499 Instructions that apply the carrier's carrier rule on an entity-by-entity basis effectively creates an exemption for telecommunications services used as inputs in broadband Internet access service when provided by a USF contributor such as TelePacific. Although the *2012 Wholesaler-Reseller Clarification Order* recognizes that the industry applies current Form 499-A reseller exemption instructions on an entity-by-entity basis,[33] it ignores similar language from the original 1997 worksheet instructions. The original

[31] 430 U.S. 274 (1977).

[32] TelePacific Feb. 1, 2010 *Ex Parte*; Notice of *Ex Parte* Communication Letters from Tamar E. Finn, Counsel to TelePacific, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-122 (filed July 26, 2012, July 30, 2012, Sept. 4, 2012); Notice of Joint *Ex Parte* Communication Letter from Nancy Lubamersky, VP, Public Policy and Strategic Initiatives for TelePacific, Michael Saperstein, Director-Federal Regulatory Affairs for Frontier Communications and Malena F. Barzilai, Senior Government Affairs Counsel of Windstream to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-122 (filed Aug. 20, 2012).

[33] *2012 Wholesaler-Reseller Clarification Order*, ¶40-41.

1997 worksheet required contributors to report "as revenues from resellers only revenues from *entities* that reasonably would be expected to contribute to support universal service.[34] Like the current worksheet instructions, the 1997 instructions categorized "resellers" on an "entity" basis.

The *2012 Wholesaler-Reseller Clarification Order* also ignores the conflict its new service-by-service interpretation creates with the *First Report and Order*. The Commission originally classified reseller revenue as end user revenue in only one limited instance, directing contributors to classify carrier revenue as end user revenue "when such carriers utilize telecommunications services *for their own internal uses*."[35] As TelePacific argued, the Commission cannot change its reseller certification standards without acknowledging and explaining the reason for the change.[36] USF contribution obligations must be consistent with the Act and Commission rules and orders.[37] Indeed, the Form 499 Instructions state that contributors should consult Commission rules to determine their obligations.[38]

The *2012 Wholesaler-Reseller Clarification Order* cites no language from the *First Report and Order* or the 1997 worksheet instructions to support its determination that allowing "instances where neither the wholesaler nor its customer contributed on its respective revenues" was inconsistent with the Commission's "original intent."[39] If the Commission wants every telecommunications service to be subject to USF contribution once, it should reverse the *First*

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[34] *Changes to the Board of Directors of the National Exchange Carrier Association, Inc. and Federal-State Joint Board on Universal Service*, 12 FCC Red 18400, 18508 (1997) ("*NECA Order*").

[35] *First Report and Order* at ¶844 (emphasis added).

[36] TelePacific September 4, 2012 *Ex Parte*, p. 2, n.6.

[37] April 1, 2009 Letter from Jennifer McKee, Acting Chief, Telecommunications Access Policy Division to Michelle Tilton, Director of Financial Operations, USAC, DA 09-748.

[38] 2012 Form 499-A Instructions, p. 2.

[39] *2012 Wholesaler-Reseller Clarification Order*, ¶40.

Report and Order's limited classification of carrier revenues as end user revenues only where the carrier utilized the service for its internal use and explain the reason for the change, including how such reversal is consistent with the Act's requirement that USF contributions be equitable and nondiscriminatory.

IV. THE COMMISSION SHOULD GRANT TELEPACIFIC'S PETITION FOR RECONSIDERATION TO ENSURE COMPETITIVE NEUTRALITY AND COMPLIANCE WITH SECTION 254 OF THE ACT.

The question posed and left unanswered is whether requiring the ILECs selling special access circuits to treat purchasers as an end user violates Section 254's principle of equitable and non-discriminatory contributions if those circuits are purchased solely to provide broadband Internet access service. TelePacific argued that legal and policy considerations compel the same answer whether contributions are required directly or indirectly: requiring one provider (TelePacific) but not another (the carrier that owns these facilities) to make USF contributions on wireline broadband Internet access service violates Section 254's requirement that USF contributions be equitable and non-discriminatory. When EarthLink pointed out how the *Wireline Broadband Order* applied to EarthLink resulted in similar discrimination months after the time to appeal that Order had passed, the Commission changed the rules to avoid such discrimination. When TelePacific pointed out how the *Wireline Broadband Order* as applied to TelePacific would result in discrimination, the Commission avoided answering the question by claiming TelePacific's request was untimely.

While the FCC prudently must manage the overall fund, it must do so within the universal service principles laid down by Congress. Therefore, while sustainability of the Fund is

important, that goal does not override the Congressional directive that all contributions be assessed on a non-discriminatory basis.[40]

Requiring TelePacific and other similarly situated carriers to make *indirect* USF contributions when their competitors that own facilities are not subject to the same requirement violates Section 254 of the Act (which requires equitable and nondiscriminatory contributions), contradicts the Commission's policy mandating a level playing field for all broadband Internet access services, impedes the Commission's goal of fostering competition and ensuring affordable access to broadband Internet access services to every American, and violates the Commission's well-established policy of competitive neutrality by creating a cascading effect that imposes USF on providers of broadband Internet access services utilizing certain leased special access facilities.

By effectively requiring TelePacific and other similarly situated providers to make indirect USF contributions on the leased special access service input used in their finished broadband Internet access product, the *2012 Wholesaler-Reseller Clarification Order*, if it is allowed to stand, will significantly disadvantage and handicap all providers that do not own such facilities. This, in turn, will have an adverse effect on competition and the supply of broadband, to the detriment of customers who rely on a proliferation of innovative and competitively-priced broadband Internet access, web hosting, data management, and similar offerings and will significantly impede the FCC's goal of fostering competition and ensuring affordable access to broadband Internet access services to every American. Such an indirect USF contribution on TelePacific's and other similarly situated providers' broadband Internet access service will tilt

[40] Any determination that the Fund is or may become "unsustainable" is a matter for Congress to address.

the playing field and determine winners and losers in the competitive broadband Internet marketplace.

TelePacific placed all of these issues in the proceeding through a series of *ex partes* and pleadings, yet the Commission arbitrarily and capriciously failed even to address them in the *2012 Wholesaler-Reseller Clarification Order*. The Commission therefore should reconsider this aspect of the *2012 Wholesaler-Reseller Clarification Order* and clarify that its rules cannot be applied to TelePacific and similarly situated purchasers of special access services in violation of the Act and long-standing principles of competitive neutrality.

V. CONCLUSION

For the foregoing reasons, the Commission should grant TelePacific's Petition for Partial Reconsideration.

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Dated: December 5, 2012

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Request for Stay	)	
Pending Reconsideration by	)	WC Docket No. 06-122
U.S. TelePacific Corp. d/b/a	)	
TelePacific Communications	)	

REQUEST FOR STAY PENDING RECONSIDERATION

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ATTACHMENTS

EXECUTIVE SUMMARY

U.S. TelePacific Corp. d/b/a TelePacific Communications ("TelePacific" or "Company") respectfully requests that the Commission stay the portion of the *2012 Wholesaler-Reseller Clarification Order* which "clarified" that "reseller" certification is required on a service-by-service basis. TelePacific simultaneously is filing a Petition for Partial Reconsideration.

TelePacific recognizes that stays rarely are granted, but believes that this case presents the uncommon combination of facts, law and public policy in which a stay legally is appropriate and factually is essential. A stay is warranted here because (i) material provisions of the *2012 Wholesaler-Reseller Clarification Order* are subject to substantial challenge upon which TelePacific is likely to prevail on the merits, (ii) TelePacific and similarly situated providers of broadband Internet access services will suffer irreparable harm if implementation is not stayed, (iii) no parties will be harmed by issuance of a stay, and (iv) a stay is in the public interest.

First, there is an overwhelming likelihood that the service-by-service certification requirement of the *2012 Wholesaler-Reseller Clarification Order* will be set aside on reconsideration or, if necessary, judicial review. Section 254 of the Act[1] and well-established Commission policy require contributions to the universal service fund ("USF") to be assessed on an equitable, competitively neutral and nondiscriminatory basis. The service-by-service reseller certification required by the *2012 Wholesaler-Reseller Clarification Order* materially contradicts the Act and Commission policies by treating differently substantially identical providers simply because one carrier owns its facilities and another carrier leases its facilities. The ownership of facilities used in the provision of broadband Internet access service should not affect the FCC's exemption of such service from USF contribution.

[1] 47 U.S.C. §254.

The Commission's action unilaterally to change the reseller certification, without first deciding the threshold question of whether the application of USF contribution rules in the manner stated in the *2012 Wholesaler-Reseller Clarification Order* violates Section 254 of the Act and well-established Commission policies, is both arbitrary and contrary to law and likely will be reversed on reconsideration or appeal.

Second, the balance of harms and the public interest requires a stay. The *2012 Wholesaler-Reseller Clarification Order* will require carriers to treat TelePacific as an end user when TelePacific incorporates leased special access services only into its broadband Internet access services, resulting in a USF surcharge cost that TelePacific will, in turn, have to recover from its broadband Internet access customers. Imposing a USF surcharge indirectly on TelePacific's services, while not imposing such surcharge on the functionally identical services of TelePacific's ILEC and cable competitors, is likely to cause some customers to "price churn" away from TelePacific, to cause TelePacific to fail to win new customers because its competitors will be able to quote rates that do not include a USF fee (currently 17.4%), and to cause TelePacific reputational injuries that inherently are irreparable. If affordable broadband is indeed a key component of increasing the size of an SMB's business and workforce, broadband that becomes unaffordable due to additional fees or lack of competition will have the opposite outcome, resulting in economic contraction in contravention of the public interest.

TelePacific respectfully requests that the Commission grant a stay before June 30, 2013, and act on TelePacific's Petition for Partial Reconsideration so the lawfulness of the *2012 Wholesaler-Reseller Clarification Order* can be resolved before the irreparable consequences begin.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	**)**	
	)	
Request for Stay	**)**	**WC Docket No. 06-122**
Pending Reconsideration by	**)**	
U.S. TelePacific Corp. d/b/a	**)**	
TelePacific Communications	**)**	

REQUEST FOR STAY PENDING RECONSIDERATION

I. INTRODUCTION

Pursuant to section 4(i) of the Communications Act of 1934, as amended ("Act"),[2] and sections 1.41, 1.43 and 54.719 of the Rules of the Federal Communications Commission ("FCC" or "Commission"),[3] U.S. TelePacific Corp. d/b/a TelePacific Communications ("TelePacific" or "Company"), through its attorneys, respectfully requests that the Commission stay the portion of the *2012 Wholesaler-Reseller Clarification Order*[4] by which the Commission "clarified" that "reseller" certification is required on a service-by-service basis and instituted rules that materially contradict the Act and the Commission's long-standing principles of nondiscrimination and competitive neutrality, pending reconsideration of that Order. TelePacific simultaneously is filing a Petition for Partial Reconsideration of the *2012 Wholesaler-Reseller Clarification Order*. As shown below, TelePacific more than satisfies the applicable legal standards for grant of a stay pending Commission review. A stay is warranted here because (i)

[2] 47 U.S.C. §154(i).

[3] 47 C.F.R. §§1.41, 1.43, and 54.719.

[4] *See Universal Contribution Methodology, Application for Review of Decision of the Wireline Competition Bureau filed by Global Crossing Bandwidth, Inc., et al.,* WC Docket 06-122, Order, FCC 12-134 (Nov. 5, 2012) ("*2012 Wholesaler-Reseller Clarification Order*").

material provisions of the *2012 Wholesaler-Reseller Clarification Order* are subject to substantial challenge upon which TelePacific is likely to prevail on the merits, (ii) TelePacific and similarly situated providers of broadband Internet access services will suffer irreparable harm if implementation is not stayed, (iii) no parties will be harmed by issuance of a stay, and (iv) a stay is in the public interest.

First, there is an overwhelming likelihood that the service-by-service certification requirement of the *2012 Wholesaler-Reseller Clarification Order* will be set aside on reconsideration or, if necessary, judicial review. Section 254 of the Act[5] and well-established Commission policy require contributions to the universal service fund ("USF") to be assessed on an equitable, competitively neutral and nondiscriminatory basis. The service-by-service reseller certification required by the *2012 Wholesaler-Reseller Clarification Order* materially contradicts the Act and Commission policies and adversely affects TelePacific and similarly situated providers of broadband Internet access service. This rule treats differently substantially identical providers simply because one carrier owns its facilities and another carrier leases its facilities, which is discriminatory, creates an unlevel playing field, and will cause irreparable harm to TelePacific and similarly situated providers of broadband Internet access services and their respective customers. The ownership of facilities used in the provision of broadband Internet access service should not affect the FCC's exemption of such service from USF contribution.

The Commission's action unilaterally to change the reseller certification, without first deciding the threshold question of whether the application of USF contribution rules in the manner stated in the *2012 Wholesaler-Reseller Clarification Order* violates Section 254 of the Act and well-established Commission policy of competitive neutrality and leveling the playing

[5] 47 U.S.C. §254.

field for all forms of broadband Internet access, is both arbitrary and contrary to law and likely will be reversed on reconsideration or appeal.

Second, even if the case on the merits were less overwhelming, the balance of harms and the public interest still requires a stay. TelePacific and similarly situated providers of broadband Internet access services (and their respective customers) will suffer immense irreparable harm if implementation is not stayed. Further, although the Commission in the *2012 Wholesaler-Reseller Clarification Order* refused to decide the threshold question of whether the application of USF contribution rules applied in the manner stated in the *2012 Wholesaler-Reseller Clarification Order* violates Section 254 of the Act and well-established Commission policy of competitive neutrality and leveling the playing field for all forms of broadband Internet access, the Commission now is seeking public comment regarding its change in the reseller certification for USF exemption purposes.[6]

Both law and the equities strongly support a stay. As the Commission has held in a similar context, permitting the Commission to change the reseller certification "before these important questions of lawfulness are resolved imposes a strong risk of upsetting the balance struck by Congress," for, in the absence of a stay, "it will be virtually impossible to 'unscramble' the effects of the [Order]."[7]

For the reasons described in TelePacific's Petition for Partial Reconsideration, TelePacific respectfully requests that the Commission act expeditiously to grant a stay before

[6] *See Proposed Changes to FCC Form 499-A, FCC Form 499-Q, and Accompanying Instructions,* Public Notice, WC Docket No. 06-122 (Nov. 23, 2012), p. 4 ("*499 Notice*").

[7] *See AT&T v. Ameritech,* Memorandum Opinion and Order, No. E-98-41 (June 30, 1998), ¶ 24 ("*Qwest Order*").

June 30, 2013,[8] and resolve promptly TelePacific's Petition for Partial Reconsideration so the lawfulness of the *2012 Wholesaler-Reseller Clarification Order* can be resolved before the irreparable consequences begin.[9]

II. THE FACTS, LAW AND POLICY ALL SUPPORT A STAY

In seeking this relief, TelePacific recognizes that stays rarely are granted, but believes that this case presents the uncommon combination of facts, law and public policy in which a stay legally is appropriate and factually is essential. As demonstrated below, the *2012 Wholesaler-Reseller Clarification Order* (i) visits irreparable harm upon TelePacific based on erroneous assumptions and misplaced conclusions of law and fact; (ii) wreaks havoc in the competitive broadband marketplace; (iii) misinterprets and misapplies the Commission's controlling decisions in this area of law; (iv) refuses to decide the threshold question of whether the application of USF contribution rules applied in the manner stated in the *2012 Wholesaler-Reseller Clarification Order* violates Section 254 of the Act and well-established Commission policy of competitive neutrality and leveling the playing field for all forms of broadband Internet access; and (v) has industry-wide consequences beyond TelePacific. All of these factors weigh heavily in favor of a stay.

[8] Carriers likely will need significant lead time to implement costly and time-consuming changes to their respective administrative systems in order to determine the exemption status of a vast spectrum of wholesale services. (*See* Joint Letter from Michael Saperstein, Director Federal Regulatory Affairs of Frontier Communications, Nancy Lubamersky, VP Public Policy and Strategic Initiatives of U.S. TelePacific Corp. d/b/a TelePacific Communications, and Malena Barzilai, Senior Government Affairs Counsel, Windstream to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-122 (filed Aug. 20, 2012)).

[9] The change in the reseller certification requirement becomes effective Jan. 1, 2014. However, the *2012 Wholesaler-Reseller Clarification Order* already applies to those resellers who may have submitted USF exemption certifications that do not track exactly the language in the prior years' 499 instructions.

The Commission has sufficient authority to issue interim relief as requested by TelePacific.[10] The four factors the Commission evaluates when considering a stay request are all present in this case and all support issuance of a stay.[11] These factors are: (1) a likelihood of success on the merits; (2) the threat of irreparable harm absent the grant of preliminary relief; (3) the degree of injury to other parties if relief is granted; and (4) that issuance of the order will further the public interest.[12] The relative importance of the four criteria varies depending upon the circumstances.[13] If there is an overwhelming showing regarding at least one factor, the Commission may find that a stay is warranted.[14] "No single factor is necessarily dispositive," and the Commission and courts will thus also grant a stay when there are "serious questions going to the merits" and the "balance of hardships tip[s] sharply" in favor of such relief.[15]

Here, all four factors strongly support the issuance of a stay. There is a powerful likelihood that the *2012 Wholesaler-Reseller Clarification Order* will be, in part, reversed on Commission review; there is substantial irreparable harm facing TelePacific, other similarly situated providers of broadband Internet access services, consumers, and the public interest; and no others face comparable harm if the longstanding definition of reseller certification continues.

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[10] *United States v. Southwestern Cable Co.*, 392 U.S. 157, 181 (1968).

[11] *See Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities,* Order, 23 FCC Rcd 1705, 1706-07 (2008) ("*Telecommunications Relay Services*") (*citing Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958) ("*Virginia Petroleum Jobbers*")).

[12] *Id.*

[13] *Id. See also The 4.9 GHz Band Transferred from Federal Government Use,* Order, 19 FCC Rcd 15270, 15272 (2004) ("*4.9 GHz Band*") (Commission balances *Virginia Petroleum Jobbers* factors on a case-by-case basis).

[14] *See Telecommunications Relay Services*, 23 FCC Rcd at 1706; *4.9 GHz Band*, 19 FCC Rcd at 15272 (same).

[15] *See Qwest Order*, ¶ 14 (citation omitted)

Thus, even if the likelihood of reversal were less strong, the balance of hardships would still tip overwhelmingly in favor of a stay.

A. TelePacific is Likely to Prevail on the Merits

TelePacific respectfully submits that it is likely to prevail on the substantive issues in its Petition for Partial Reconsideration. The proponent of a stay must make a "strong showing" that it is "likely to prevail on the merits."[16] The likelihood that a petitioner will succeed on the merits of its appeal is an important aspect of the Commission's analysis.[17] Because TelePacific's showing on this factor alone is overwhelming, a stay is warranted in this instance.

TelePacific's Petition for Partial Reconsideration demonstrates that the Commission acted arbitrarily and capriciously in failing to address material issues presented by TelePacific. By failing to address these issues, the Commission imposed rules that create discrimination among providers of broadband Internet access services and adversely affect TelePacific and similarly situated providers of broadband Internet access services. This discrimination (i) violates Section 254 of the Act, (ii) contradicts the Commission's policy of a level playing field for all broadband Internet access services, (iii) contradicts the Commission's goal of fostering competition and ensuring affordable access to broadband Internet access services to every American, and (iv) violates the Commission's well-established policy of competitive neutrality by creating a cascading effect that imposes USF contribution obligations on providers of broadband Internet access services utilizing certain leased special access facilities but not on facilities-based providers of the identical service.

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[16] *Virginia Petroleum Jobbers*, 259 F.2d at 925.

[17] *See Brunson Communications, Inc. v. RCN Telecom Services, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 12883, 12883-84 (2000) (granting stay pending resolution of application for review before the Commission and finding that petitioner showed it was likely to succeed on the merits).

The Commission erred in assuming TelePacific was seeking reconsideration of previously adopted FCC Orders and inappropriately dismissed TelePacific's concerns as untimely.[18] TelePacific did not seek then, and is not now seeking, reconsideration of prior FCC Orders. TelePacific now is seeking reconsideration of the *2012 Wholesaler-Reseller Clarification Order* because it attempts to apply the decisions adopted in prior FCC Orders to TelePacific in a way that violates the Act and the Commission's rules and long-standing policies. Specifically, the *2012 Wholesaler-Reseller Clarification Order* improperly requires carriers to treat TelePacific as an end-user when TelePacific incorporates leased special access services only into its broadband Internet access services yet exempts wholesale carriers from making USF contribution when they self-provision the identical broadband Internet access service. The Form 499 Instructions that apply the carrier's carrier rule on an entity-by-entity basis create an exemption for telecommunications services used as inputs in broadband Internet access service when provided by a USF contributor such as TelePacific. In the *2012 Wholesaler-Reseller Clarification Order*, the Commission ignored the conflict its new service-by-service interpretation creates with the *First Report and Order*,[19] failed to offer a reasonable justification for its conclusion, failed to consider alternatives to the directives it issued, failed to weigh the costs and benefits of the directives, and failed to take into account the problem of duplicative USF contribution, all of which were issues raised by the comments it received from TelePacific and others throughout the proceeding. The Commission cannot change its reseller certification requirement without acknowledging and explaining the reason for the change. This aspect of the

[18] *See 2012 Wholesaler-Reseller Clarification Order* at n.109.

[19] *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, ¶ 47 (1997) ("*First Report and Order*").

2012 Wholesaler-Reseller Clarification Order is arbitrary and capricious because the Commission "entirely failed to consider an important aspect of the problem…."[20]

The *2012 Wholesaler-Reseller Clarification Order* violates FCC rules and federal law that require USF contributions to be equitable and competitively and technologically neutral. By erroneously basing its reseller certification requirement on ownership of facilities rather than the finished product, as required by the *Wireline Broadband Order*,[21] the Commission contradicted and undermined controlling law that establishes a level playing field for all broadband Internet access services, regardless of technology or ownership of facilities used to deliver the information service to consumers. By singling out for USF contribution broadband Internet access delivered over leased special access circuits, the Commission placed TelePacific and its customers (and similarly situated providers and their customers) at a distinct competitive disadvantage – a cost increase of 17.4% based on the current Contribution Factor – in the broadband market. In effect, the *2012 Wholesaler-Reseller Clarification Order* interferes with the broadband market and picks winners and losers among broadband Internet access service providers in a highly competitive marketplace where price becomes more and more important to consumers.

Congress included two particularly critical principles in Section 254 of the Act – USF contributions shall be made on an *equitable* and *nondiscriminatory* basis.[22] Further, the Universal

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[20] *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Illinois Pub. Telecomm. Ass'n v. FCC*, 177 F.3d 555, 566 (D.C. Cir. 1997) (finding that the Commission's failure to explain its decision not to provide interim compensation for certain carriers as required by statute, and its failure to cite a reasonable justification for the interim rate it chose, was arbitrary and capricious).

[21] *See Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) ("*Wireline Broadband Order*").

[22] 47 U.S.C. §§ 254(b)(4), (d) (emphasis added)

Service Administrative Company ("USAC") is required to administer the universal service support system "in an efficient, effective and competitively neutral manner."[23] In the *First Report and Order*, the FCC adopted a principle of competitive neutrality:

> competitive neutrality means that universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another.[24]

Assessing USF contributions on the providers of the upstream transmission service (here, the ILECs leasing to TelePacific special access circuits) utilized as an input to TelePacific's broadband Internet access service violates the principle of competitive neutrality. It also contradicts and undermines the USF exemption the Commission granted for the finished service, especially because the Commission went out of its way to emphasize, "there is no reason to classify wireline broadband Internet access services differently depending on who owns the transmission facilities."[25]

The proponent of a stay is not to show that success is certain, but only that success is likely. TelePacific has demonstrated herein and in its Petition for Partial Reconsideration that its position is supported by FCC rules and orders and sound factual and public interest considerations. In order to grant a stay, the Commission is not required to render substantive determinations regarding the underlying issues on appeal. TelePacific submits that a stay is warranted pending Commission review of the substantive issues before it.

B. The Balance of Harms Favors Granting TelePacific's Request

The remaining three criteria in *Virginia Petroleum Jobbers* also support a stay in this case. As explained below and for the reasons set forth more fully in the attached Declarations of

[23] *Wireline Broadband Order*, ¶ 16.

[24] *First Report and Order*, ¶ 47.

[25] *Wireline Broadband Order*, ¶ 16.

Nancy Lubamersky and David Zahn, TelePacific (as well as its customers) is likely to suffer irreparable harm if the Commission does not issue a stay; no other party would be harmed by a stay; and a stay would further the public interest.

1. Irreparable Harm to TelePacific

TelePacific will incur substantial hardship and irreparable harm if the *2012 Wholesaler-Reseller Clarification Order* is not stayed and if TelePacific is required to make USF contributions, indirectly, on its broadband Internet access service. The *2012 Wholesaler-Reseller Clarification Order* will require carriers to treat TelePacific as an end user when TelePacific incorporates leased special access services only into its broadband Internet access services, meaning these carriers will add a USF surcharge to their charges to TelePacific, resulting in an increased cost that TelePacific will, in turn, have to recover from its broadband Internet access customers.

If TelePacific is forced to make USF contributions, indirectly, on its broadband Internet access service, TelePacific will be unfairly prejudiced as compared to its many competitors who are providing the same or similar broadband Internet access services without making any USF contributions. Commission rules exempt wholesale carriers from making USF contribution when they self-provision broadband Internet access service using facilities identical to those that TelePacific purchases as special access. Specifically, AT&T, the major incumbent provider in TelePacific's territory, will not be required to pay USF since it owns the transmission facility used to provide broadband Internet access services, placing TelePacific at a competitive disadvantage. Lubamersky Decl. ¶ 11.

TelePacific also competes head-to-head with cable providers, such as Cox and Time Warner Cable, which provide broadband Internet access over coaxial cable and therefore do not pay USF contributions.[26]

TelePacific estimates its cost of service will increase between $18.00 and $300.00 per month, depending on the wholesale cost of the leased special access service, Zahn Decl. ¶ 11, as a result of the Commission's new reseller certification requirement. Although FCC rules allow a direct contributor to recover its USF costs from end users,[27] TelePacific will not be able to recover its USF contributions through a line item on its customer's bill since TelePacific will not be a direct USF contributor in this regard and, rather, will be paying indirectly through its wholesale carrier. TelePacific's only means of recovering the increased operating cost now imposed by the *2012 Wholesale-Reseller Clarification Order* is to increase the cost of its service to customers (if contractually permitted to do so). As a result, TelePacific's customers will pay more than those receiving the identical service from providers that own their own facilities. Zahn Decl. ¶ 10. In this burgeoning broadband market and difficult economy, price becomes more and more important to consumers.

Complying with the *2012 Wholesaler-Reseller Clarification Order* could cause TelePacific to lose customers, or fail to attract new customers, since its broadband offerings likely will be more expensive than its competitors' offerings, Zahn Decl. ¶ 14, because its cost of service is higher or because it passes indirect USF contributions through to its customers. As shown by the Declaration of David Zahn, the market in which TelePacific offers integrated

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[26] *See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185 and CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002).

[27] 47 C.F.R. § 54.712(a)

broadband Internet services is increasingly price competitive and carriers frequently gain and lose customers based on price. Generally, these gains and losses are referred to in the industry as "price churn." Thus, imposing a USF surcharge indirectly on TelePacific's services, while not imposing such surcharge on the functionally identical services of TelePacific's ILEC and cable competitors, is likely to cause some customers to "price churn" away from TelePacific. Zahn Decl. ¶ 10. It is also likely to cause TelePacific to fail to win new customers because its competitors will be able to quote rates that do not include a USF fee (currently 17.4%). Zahn Decl. ¶ 14.

Further, harms are not just loss of customers, but reputational injuries that inherently are irreparable. Even if TelePacific succeeds in its Petition for Partial Reconsideration and later removes the 17.4% cost increase from its service, its brand would be irreparably damaged as customers likely will continue to view TelePacific as the carrier that charges fees other carriers do not. Zahn Decl. ¶ 14, Lubamersky Decl. ¶ 12.

The Commission has held that potential loss of new and existing customers and of customer good will is irreparable harm that satisfies the standard for grant of a stay.[28] For example, where petitioner long distance providers were losing customers and hence faced "substantially greater harm" than Ameritech and Qwest, which were jointly marketing an interLATA long distance offering, the Commission found that the balance of harms favored grant of a standstill order.[29] In short, "when the failure to grant preliminary relief creates the

[28] *See Iowa Utilities Bd. v. FCC*, 109 F.3d 418, 425 (8th Cir. 1996) (holding that while "economic loss does not, in and of itself, constitute irreparable harm" the "threat of *unrecoverable* economic loss, however, does qualify as irreparable harm" which includes losses that cannot be recovered through market participation and "potential loss of customer good will") (emphasis added; internal quotes and citations omitted).

[29] *Qwest Order*, ¶¶ 27-28.

possibility of permanent loss of customers to a competitor or the loss of goodwill, the irreparable harm injury prong is satisfied."[30] The harm presents itself here in an equally compelling manner.

2. Harm to Others and the Public Interest

No party will be injured by the entry of a stay, particularly since the public currently has an opportunity to comment on this substantive issue.[31] On the other hand, a stay will prevent harm to consumers and carriers and protect the public interest.

a. Harm to Consumers

Imposing a USF contribution requirement on TelePacific and more broadly on all wireline broadband Internet access providers using leased special access circuits and their customers, will determine winners and losers in the competitive broadband Internet marketplace. Consumers also will be harmed because they will have fewer competitive choices and by a likely increase in monopoly power in the areas served by TelePacific. The market segment that TelePacific services, the small and medium business ("SMB") segment, already is heavily concentrated in the power of the ILECs. For instance, in California and Nevada, the incumbent carriers already have approximately 80 percent of the business market. Zahn Decl. ¶ 13. As noted above, if TelePacific is required to make indirect USF contributions on the wireline broadband Internet access service, this increase in cost would need to be passed on to customers. If TelePacific, but not the ILECs or cable companies, is required to contribute to the USF, the ILECs, other facilities-based providers and cable companies will receive a significant cost advantage over their competitors and would be in a position to consolidate further their market power. Zahn Decl. ¶ 10, Lubamersky Decl. ¶ 11.

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[30] *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 552 (4th Cir. 1994).

[31] *See 499 Notice.*

TelePacific has become the second largest recipient of E-Rate and Rural Health Care support for its customers in the state of California. Imposing indirect USF contributions on TelePacific's broadband Internet access services could harm its many school and rural health care customers. Lubamersky Decl. ¶ 14. Although TelePacific provides both voice and broadband Internet service to many of its school and rural health care customers, there are some customers that purchase only broadband Internet access from TelePacific. In some cases, TelePacific's rural health care customers were able to move from dial-up or DSL access to broadband access only through TelePacific's bonding of multiple special access circuits. Imposing indirect USF contributions on these services could make them unaffordable (if TelePacific is permitted by contract or law to pass through such charges), Lubamersky Decl. ¶ 15, or uneconomic (if TelePacific must absorb the USF fees). *Id*. Imposing indirect USF contribution on these services could have a devastating effect on small business, particularly in rural areas where price cap ILECs currently are not even offering broadband Internet access. Lubamersky Decl. ¶ 16.

If the *2012 Wholesaler-Reseller Clarification Order* is not stayed, "it will harm consumers' interests, as identified by Congress, because of its anti-competitive nature" and it will be "virtually impossible to 'unscramble' the effects of the [order] and return to the status quo" if it is subsequently vacated and, it will lead to "widespread consumer uncertainty and confusion" [32] if vacated after January 1, 2014.

b. The Public Interest

Additionally, the issuance of a stay advances the public interest. Chairman Julius Genachowski has stated that small businesses are "a driving force in our economy" and that

[32] *Qwest Order*, ¶¶25-26.

broadband service "is critical to helping small businesses operate more efficiently and compete globally."[33] The overarching public policy interest lies in fostering competition and promoting the ubiquitous deployment of broadband at affordable prices throughout the United States and especially to the SMB segment, which TelePacific serves. Zahn Decl. ¶ 13. It is this very policy that the *2012 Wholesaler-Reseller Clarification Order* turns on its head. If affordable broadband is indeed a key component of increasing the size of an SMB's business and workforce, broadband that becomes unaffordable due to additional fees or lack of competition will have the opposite outcome, resulting in economic contraction. As the Commission recognized in the *Wireline Broadband Order*, there is no public policy goal that supports putting certain providers of broadband Internet access at a competitive disadvantage through the imposition of USF fees based on the transmission of technology used to deliver the information service. The Commission must not be allowed impermissibly to create and impose such a policy through the *2012 Wholesaler-Reseller Clarification Order*. Absent a stay, TelePacific would be placed at a competitive disadvantage if it is subject to paying for services for which its competitors remain exempt. Zahn Decl. ¶ 10, Lubamersky Decl. ¶ 11. This unjustifiable, punitive treatment of TelePacific would harm not only TelePacific but also its customers and competition. Zahn Decl. ¶ 14, Lubamersky Decl. ¶ 12. A stay would be consistent with the public interest.

III. CONCLUSION

For all of the foregoing reasons, and to avoid competitive harm and irreparable harm to its business and its customers, TelePacific respectfully requests the Commission grant a stay of the implementation of the service-by-service reseller certification requirement adopted in the

[33] *See* Prepared Remarks of Chairman Julius Genachowski, Federal Communications Commission, Broadband Field Hearing on Small Business, Chicago, Illinois, Dec. 21, 2009.

2012 Wholesaler-Reseller Clarification Order until 90 days after the Commission issues its order resolving TelePacific's Petition for Partial Reconsideration.

Respectfully submitted,

/s/ electronically signed

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Counsel for U.S. TelePacific Corp. d/b/a TelePacific Communications

Dated: December 5, 2012

ATTACHMENT A

Declaration of Nancy Lubamersky

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Request for Stay	)	
Pending Reconsideration by	)	WC Docket No. 06-122
U.S. TelePacific Corp. d/b/a	)	
TelePacific Communications	)	

DECLARATION OF NANCY LUBAMERSKY

1. My name is Nancy Lubamersky. I am Vice President of Public Policy and Strategic Initiatives at U.S. TelePacific Corp. ("TelePacific"). My business address is 515 S. Flower Street, 47th Floor, Los Angeles, CA 90071-2201.

2. I am authorized to make this declaration on behalf of TelePacific.

3. I am providing this declaration in support of TelePacific's Request for Stay Pending Reconsideration ("Stay") and TelePacific's Petition for Partial Reconsideration of the *2012 Wholesaler-Reseller Clarification Order*.

4. At TelePacific, I am responsible for negotiating with ILECs on issues regarding products and services, rates, terms and conditions, leading TelePacific's interdepartmental Revenue Opportunity and Cost Savings Steering Committee, and developing and implementing Public Policy advocacy at state PUCs, FCC and legislatures, and thus have a detailed understanding of how the regulatory framework applies to TelePacific's product offerings and its strategic and competitive position in the industry.

5. I am the Co-Chair and Treasurer of CALTEL, an association of competitive providers of communications services in California, and I serve on the Board of Directors of Texaltel, a similar CLEC association in Texas.

6. It is my understanding that when a telecommunications carrier offers and provides broadband Internet access that functionally integrates data transmission with information processing capabilities into a unitary, always-on service, this broadband Internet access service is an information service not subject to USF contribution. TelePacific provides such a service to its end-user customers, mainly utilizing leased special access services as the transmission component.

7. TelePacific has a substantial network of its own, including switches, interoffice transport, and hundreds of collocations in ILEC wire centers in California, Nevada and Texas. However, TelePacific leases special access circuits to provision the vast majority of its broadband Internet access services.

8. Based upon the *2012 Wholesaler-Reseller Clarification Order*, it is my understanding that, effective January 1, 2014, TelePacific will be required to certify to each carrier that provides it with special access service, on a circuit-by-circuit basis, whether TelePacific is a "reseller" with respect to each such special access circuit. Further, I understand that if TelePacific is using a particular special access circuit only to provide its customer with broadband Internet access service, and no other service, then TelePacific will not be permitted to certify that it is a "reseller" with respect to that circuit. As a result, TelePacific's underlying carriers will be required to treat TelePacific as an end user. The underlying carriers then will be required to make USF contributions on the revenue received from TelePacific's purchase of those service and the carriers will impose USF surcharges on TelePacific. This has the same economic effect on TelePacific as if TelePacific were required to contribute directly to the USF based on the price of the special access services.

9. However, it is my understanding that TelePacific is not required to pay any USF contributions with respect to broadband Internet access services that it provisions to its customers using its own facilities.

10. Further, it is my understanding that if TelePacific were to purchase a finished broadband Internet service from a facilities-based carrier (even if that service used precisely the same transmission facilities as the existing special access circuits) and resell that finished service to its customers, the facilities-based carrier would not be required to pay any USF contributions on its revenues from that service and, thus, there would be no indirect contribution burden on TelePacific.

11. If TelePacific is required to be treated as an end user and required to contribute indirectly to USF on the special access circuit used to deliver its broadband Internet access service to its customers, it will face a substantial cost disadvantage compared to its competitors, including facilities-based carriers, ILECs and cable modem providers, who are not paying USF on these functionally equivalent services.

12. If TelePacific were to seek to recover its indirect USF contribution costs from its customers, the customers very likely would view that recovery as a price increase, particularly since many other carriers, including TelePacific's main competitors, don't have such a fee to pass through to their customers. Depending on the size of the perceived price increase, TelePacific's relationship with the customer, and the alternatives available in the market, some customers likely would seek alternative (and now lower cost) providers of the same broadband Internet access service.

13. Customers who switch service providers based on this USF disparity would be unlikely to return to TelePacific in the near term because of non-recurring fees and potential dis-

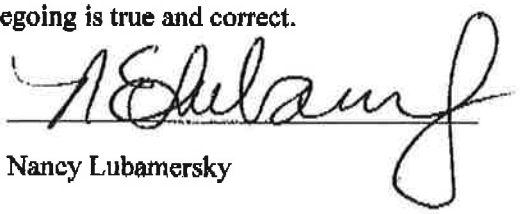
ruption to their business associated with service turn-up by a new carrier. Even if TelePacific succeeds in its Petition for Reconsideration and later removes the USF fee from its service, its brand would be irreparably damaged as customers likely would continue to view TelePacific as the carrier that charges fees other carriers do not. Therefore, the loss of revenue to TelePacific could be irreversible.

14. TelePacific has become the second largest recipient of E-Rate and Rural Health Care support in the State of California. Imposing indirect USF contributions on TelePacific's broadband Internet access services could harm its many school and rural health care customers.

15. Although TelePacific provides both voice and broadband Internet service to many school and rural health care customers, there are some customers that purchase only broadband Internet access from TelePacific. In some cases, TelePacific's rural health care customers were able to move from dial-up or DSL access to broadband access only through TelePacific's bonding of multiple special access circuits. Imposing indirect USF contributions on these services could make them unaffordable (if TelePacific is permitted by contract or law to pass through such charges) or uneconomic (if TelePacific must absorb the USF fees).

16. Imposing indirect USF contribution on these services could have a devastating effect on small business, particularly in rural areas where some price cap ILECs currently are not even offering broadband Internet access.

I affirm under penalty of perjury that the foregoing is true and correct.



Nancy Lubamersky

ATTACHMENT B

Declaration of David Zahn

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Request for Stay	)	
Pending Reconsideration by	)	WC Docket No. 06-122
U.S. TelePacific Corp. d/b/a	)	
TelePacific Communications	)	

DECLARATION OF DAVID ZAHN

1. My name is David Zahn. I am Vice President of Marketing of U.S. TelePacific Corp. d/b/a TelePacific Communications ("TelePacific"). My business address is 515 S. Flower Street, 47th Floor, Los Angeles, CA 90071-2201.
2. I am authorized to make this declaration on behalf of TelePacific.
3. I am providing this declaration in support of TelePacific's Request for Stay Pending Reconsideration ("Stay") and TelePacific's Petition for Partial Reconsideration of the *2012 Wholesaler-Reseller Clarification Order*.
4. At TelePacific, I am responsible for Product Management, Product Marketing and Product Development, and, thus, I have a detailed understanding of TelePacific's product offerings and strategic and competitive position in the industry. I also have knowledge about TelePacific's network and how services are delivered to customers.
5. TelePacific has a substantial network of its own, including switches, interoffice transport, and hundreds of collocations in ILEC wire centers in California, Nevada and Texas. However, TelePacific leases special access circuits to provision the vast majority of its broadband Internet access services.

6. TelePacific does not offer or sell stand-alone "special access circuits," such as T-1s, to its retail customers. Rather, TelePacific sells its customers a variety of voice and broadband Internet access services that rely on special access circuits to connect end user customers to TelePacific's network. I am familiar with other competitive carriers in TelePacific's operating territory and other operating territories that provide their broadband Internet access services in a similar manner.
7. TelePacific offers a variety of dedicated broadband Internet access options, including (A) a basic T-1-based service that offers up to 1.544 megabits per second ("Mbps") access to the Internet; (B) a "bonded T-1" service, which is up to eight T-1s that are virtually fused for greater broadband speeds up to 12 Mbps; and (C) a DS-3-based offering which provides the broadband Internet access over a single, larger circuit at speeds up to 45 Mbps.
8. TelePacific, like many competitive carriers, provides services that allow customers to use a special access circuit for broadband Internet access and switched voice. TelePacific contributes directly to the USF on the end user telecommunications revenues derived from these bundled service offerings.
9. Based upon the *2012 Wholesaler-Reseller Clarification Order*, it is my understanding that, effective January 1, 2014, TelePacific will be required to certify to each carrier that provides it with special access service, on a circuit-by-circuit basis, whether TelePacific is a "reseller" with respect to each such special access circuit. Further, I understand that if TelePacific is using a particular special access circuit only to provide its customer with broadband Internet access service, and no other service, then TelePacific will not be permitted to certify that it is a "reseller" with respect to

that circuit. As a result, TelePacific's underlying carriers will be required to treat TelePacific as an end user and those carriers will impose surcharges on TelePacific in an amount equal to the underlying carrier's USF contribution obligation on those special access circuits.

10. If TelePacific were required to be treated as an end user and required to contribute indirectly to the USF on the special access circuits used to deliver its broadband Internet access service to customers, it would face a substantial cost disadvantage compared to its competitors, including facilities-based ILECs (*e.g.*, AT&T, the major incumbent provider in TelePacific's territory) and cable modem providers (*e.g.*, Cox and Time Warner Cable), who are not paying USF on these functionally equivalent services.

11. As described above, TelePacific offers various broadband Internet access services. The majority of TelePacific's small and medium business ("SMB") customers purchase broadband Internet access delivered over a special access circuit TelePacific leases from AT&T or other ILECs. Applying the current USF contribution factor of 17.4% results in cost increases to TelePacific of between $18.00 and $300.00 per month, depending on the specific special access service and respective wholesale cost.

12. TelePacific does not categorize its broadband Internet access products based on whether such product is delivered to the customer over fiber, coax or special access services leased from TelePacific's underlying providers.

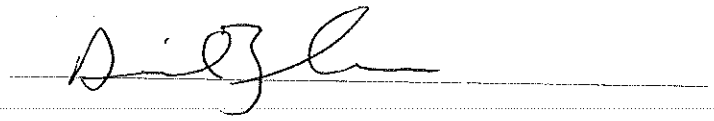
13. The market segment that TelePacific serves, the SMB segment, is already heavily concentrated, with ILECs having an approximately 80 percent share of the business

market in California and Nevada. As stated above, TelePacific also competes head-to-head with cable providers. Carriers frequently gain and lose customers based on price.

14. If TelePacific's customers were charged more for their service in order for TelePacific to recover its indirect USF contribution, it is my opinion that TelePacific would lose customers and fail to attract new customers because its broadband Internet access service no longer would be priced competitively.

15. Customers who switch service providers based on this USF disparity would be unlikely to return to TelePacific in the near term because of non-recurring fees and potential disruption to their business associated with service turn-up by a new carrier.

I affirm under penalty of perjury that the foregoing is true and correct.



David Zahn, Vice President, Marketing

U.S. TelePacific Corp. d/b/a TelePacific Communications

CERTIFICATE OF SERVICE

I, M. Renee Britt, certify that on this 5th day of December, 2012, I caused a copy of the foregoing Petition for Partial Reconsideration and Request for Stay Pending Reconsideration to be served upon the parties listed below via First Class Mail, unless otherwise noted:

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/s/ M. Renee Britt

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Comments was sent via electronic mail on January 11, 2013 to:

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